

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 28 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

WILLIAM JAMES NIELSON
CORBETT,

Appellant.

2 CA-CR 2006-0331
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054685

Honorable Charles S. Sabalos, Judge

AFFIRMED

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Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant William James Nielson Corbett was convicted of child molestation and sexual abuse. He was sentenced to the presumptive prison term of seventeen years and a lifetime term of probation, respectively. On appeal, Corbett argues the trial court erred by admitting irrelevant, unduly prejudicial evidence and by limiting his cross-examination of a witness. We affirm his convictions for the reasons set forth below.

Facts and Procedural Background

¶2 Corbett inappropriately touched his niece in 1995 and 1996 when she was between seven and eight years old. A Pima County grand jury charged him with five offenses relating to two separate incidents, one of which took place at a swimming pool, the other in Corbett's living room. The first trial was conducted over nine years later; his then eighteen-year-old niece testified against him. That jury acquitted Corbett of all charges stemming from the pool incident. However, it was unable to reach a verdict on the two remaining charges, which related to the living-room incident. The trial court declared a mistrial as to these charges, setting the case for retrial.

¶3 The state subsequently filed a motion in limine, seeking to introduce evidence at Corbett's retrial that had not been introduced at the first trial. The court granted the state's motion with respect to several sexually explicit images of underage girls recovered from Corbett's computer and an electronic mail instant message in which Corbett claimed to have "fingered" his eleven-year-old niece. The court ruled the evidence was admissible to show the alleged touching was not a mistake and demonstrated his aberrant sexual

propensity for prepubescent girls. During trial, the court also ruled that the instant-message statement was admissible as a party admission.

¶4 During the retrial, the state then offered testimony regarding the instant message and published to the jury the sexually explicit child pornography evidence. When his niece again testified, the court permitted Corbett to impeach her credibility with evidence regarding the pool incident and her earlier testimony about it. But the court precluded Corbett from introducing any evidence that a prior trial had occurred or about the fact that he had been acquitted of some of the charges. This appeal followed Corbett’s convictions of child molestation and sexual abuse.

Discussion

Limiting Cross-Examination

¶5 Corbett first argues that the trial court violated his right to present exculpatory evidence when it precluded him from cross-examining his niece regarding his acquittal on other charges during the first trial. He contends, as he did below, that this evidence was admissible pursuant to A.R.S. § 13-1421, to show his niece had made a false accusation against him. The trial court refused to admit evidence of the acquittals on this ground, stating, “The fact that the State failed to prove its case beyond a reasonable doubt does not establish that the accusation was false.” We review the court’s ruling on the admissibility of evidence for an abuse of discretion, *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990), and we find none here.

¶6 Section 13-1421(A)(5) allows evidence of a victim’s false accusations to be admitted in a sex-offense case. But, as the trial court correctly noted, an acquittal in a criminal trial demonstrates only that the state did not satisfy its burden of proving the elements of the offense or offenses beyond a reasonable doubt; it does not establish the truth or falsity of the charges in an indictment or, by extension, the testimony of the state’s witnesses. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) (“[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.”); *accord Pfeil v. Smith*, 183 Ariz. 63, 65, 900 P.2d 12, 14 (App. 1995). Nonetheless, Corbett suggests we should find acquittals relevant to a witness’s credibility when, as here, the jury has acquitted a defendant of charges based entirely on that witness’s testimony. We disagree. Indeed, under Arizona law, the jury could have acquitted Corbett in the first trial even if it believed that Corbett’s niece’s accusations probably were true. *See State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (to carry burden of proof beyond a reasonable doubt, state must show more than “a fact is more likely true than not or that its truth is highly probable”). Accordingly, the trial court did not abuse its discretion by refusing to admit evidence of Corbett’s previous acquittals during his cross-examination of the victim pursuant to § 13-1421(A)(5).

¶7 In a related argument, Corbett asserts he should have been entitled to cross-examine his niece about the earlier trial and acquittals to show she had an increased motive to lie at the second trial and fabricate evidence to strengthen the state’s case on retrial. But

Corbett did not raise any species of this argument before or during his niece's testimony. Instead he had maintained only that evidence of his acquittals and earlier trial was necessary "to show the entire system of events that results in the prosecution today" and to demonstrate that "another jury had the opportunity to hear all together and to decide all together and to separate the wheat from the chaff." Although Corbett did eventually suggest that evidence of an earlier trial would be relevant to demonstrate his niece's motive to change her testimony in the instant case, he did so only in the context of seeking to present it as substantive evidence after the state had rested. Thus, Corbett never urged this theory to the trial court, as he does on appeal, as a basis for expanded cross-examination of his niece.

¶8 Although Corbett is correct that "constitutional arguments may be considered for the first time on appeal," *see State v. Gilfillan*, 196 Ariz. 396, n.4, 998 P.2d 1069, 1074 n.4 (App. 2000), his failure to assert these evidentiary arguments below forfeited these issues on appeal absent fundamental error, *see State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). We thus review the court's preclusion of evidence of Corbett's acquittals and the initial trial only for fundamental error that was prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Corbett has failed to articulate how the trial court's ruling was prejudicial. Therefore, we reject this claim. *See State v. Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d 479, 481 (2007) (defendant bears burden of showing prejudice

under fundamental error review); *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (defendant must establish error caused him prejudice).¹

Admission of Evidence

¶9 Corbett next argues the trial court erred by admitting evidence of child pornography found on his computer and his instant message that he “fingered” his niece. The court admitted both items to show (1) Corbett had an aberrant sexual propensity for prepubescent girls, pursuant to Rule 404(c), Ariz. R. Evid.; and (2) the alleged touching had not been an accident or a mistake, pursuant to Rule 404(b). The record suggests the trial court also found Corbett’s instant-message statement independently admissible as a party admission of the charged conduct itself. *See* Ariz. R. Evid. 801(d)(2). On appeal, Corbett raises various challenges to the relevance and prejudicial nature of this evidence under Rules 404(b) and (c).

¶10 We conclude the trial court did not abuse its discretion by admitting both items of evidence under Rule 404(c). Therefore, we need not address whether the trial court erred in admitting the evidence under Rule 404(b) or, in the case of the instant message, as a party admission. *See State v. Williams*, 209 Ariz. 228, ¶ 25, 99 P.3d 43, 49 (App. 2004)

¹Notably, the trial court granted Corbett’s motion to allow him to present evidence about the pool incident to “provide[] a . . . psychological explanation” for why his niece would lie about the charges. Moreover, the court permitted Corbett to impeach his niece with testimony from a transcript of his earlier trial when she made a contradictory statement regarding the living-room incident. Therefore, even assuming the trial court erred when it refused his request to impeach the victim with evidence regarding the existence and outcome of the previous trial, we question whether such error was significantly prejudicial.

(evidence admissible for one purpose may be admitted even if inadmissible for another purpose).²

¶11 When a defendant is charged with a sex offense, Rule 404(c) provides “evidence of other crimes, wrongs, or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.” The rule directs the trial court to make a number of findings on the record before such other-act evidence may be admitted. Ariz. R. Evid. 404(c)(1)(D). Specifically, the judge must conclude each of the following conditions is met:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403[, Ariz. R. Evid.].

Ariz. R. Evid. 404(c)(1)(A) through (C). In weighing the probative value and risk of unfair prejudice posed by the admission of evidence of other acts, as is required by Rule 403, Rule 404(c)(1)(C) requires the trial court to consider the following factors:

²Because Corbett has not suggested the court erred in failing to provide limited admissibility instructions specific to one theory of admissibility or another, we need not address all relevant theories of admissibility. *See State v. Williams*, 209 Ariz. 228, ¶ 26, 99 P.3d 43, 49-50 (App. 2004).

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

The state must prove other acts to show defendant had aberrant sexual propensity by clear and convincing evidence. *State v. Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004); *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997).

¶12 The trial court admitted Corbett’s instant-message statement that he had “fingered” his eleven-year-old niece under Rule 404(c) because “there [was] clear and convincing evidence that he did make the statement,” and, regardless of the truth of the claim, the “expression of a desire to commit an act like that or to fantasize about it would provide a reasonable basis for the inference that the Defendant had a character trait giving rise to an aberrant sexual propensity to commit . . . sexual abuse and child molestation.”

¶13 Although Corbett wrote the statement up to ten years after the charged act of molestation, the court found the passage of time did not render the other act too remote, especially given the similarity between the statement and the crime charged. Both involved

Corbett touching his niece's genitals with his finger. Apart from arguable dissimilarities in the age and identity of the niece he touched or fantasized about touching, the court noted no other similarities or differences between the statement and the crime charged. The court did not consider the frequency of the act to be material, nor did it find any relevant intervening events. Because the statement came from Corbett himself, the court found "the evidentiary value of the proof of [the instant message was] not substantially outweighed by the danger of unfair prejudice."

¶14 Corbett argues this evidence was irrelevant because if it were false, it would not meet the clear-and-convincing standard required before evidence of other acts could be admitted. And he maintains that, even if it were true, it would show only his tendency to talk about such acts, not necessarily a propensity to commit them. He also argues that the evidentiary value of the instant message was substantially outweighed by its danger of unfair prejudice.

¶15 First, assuming *arguendo* that Corbett's instant-message statement is completely false, the trial court was nonetheless entitled to admit the statement itself as an "act" under Rule 404(c) that would support an inference he had a propensity to commit sexually aberrant acts such as the charged offenses. His comments, even if only an expression of his fantasies about sexually touching his prepubescent niece, clearly demonstrated a propensity to be aroused by sexual activity with prepubescent girls—a propensity that would be both aberrant and suggest a character trait relevant to the charge

of sexually touching his prepubescent niece. *See Aguilar*, 209 Ariz. 40, ¶ 27, 97 P.3d at 873 (older common-law rule required that other act demonstrate an accused’s propensity to commit criminal act itself; Rule 404(c) “requires [only] that the other act evidence ‘provide[] a reasonable basis to infer that the defendant had a *character trait* giving rise to an aberrant sexual propensity to commit’ [the charged] offenses”) (emphasis added), *quoting* Ariz. R. Evid. 404(c)(1)(B). And, if the statement that he had “fingered” his eleven-year-old niece were true, it would be admissible for the same reason regardless of whether it constituted an admission to the same event charged. *See* Ariz. R. Evid. 404(c) (addressing the admissibility of “*other* crimes, wrongs, or acts”—not the admissibility of defendant’s admissions to the charged offense) (emphasis added).

¶16 Last, we conclude that evidence of a defendant’s aberrant sexual propensity is especially probative and relevant in a case such as this, when the state must prove that any touching of the victim was sexually motivated.³ Although we recognize the great potential of unfair prejudice arising from the jury’s awareness of a defendant’s other bad acts, the trial court did not abuse its discretion in finding under the circumstances here that the probative value of Corbett’s statement was not substantially outweighed by that risk.

³Although Corbett neither specifically argued this theory to the jury nor developed it on cross-examination, he sought and received an instruction, over the state’s objection, advising the jury it must acquit him if it concluded his touching of the victim had not been sexually motivated.

¶17 The trial court also admitted images of what it described as “prepubescent females showing . . . their genitalia, touching themselves, [and] looking fairly provocative.”⁴ The court found Corbett possessed this child pornography by clear and convincing evidence and, from its possession, the jury could reasonably infer an aberrant sexual propensity to commit child molestation and sexual abuse.

¶18 In support of this ruling, the court found that a maximum period of ten years separating the charged crimes and the other act did not render the possession too remote, because, like sexual orientation, the propensity to view child pornography and perform sexual acts with children presumably does not change with time. The pornography was similar to the charged crimes insofar as both involved the sexual exploitation of prepubescent girls. Furthermore, it found the evidence was exceptionally strong because the images were recovered from Corbett’s computer and he admitted he enjoyed looking at girls of that age. The trial court believed this admission overshadowed the infrequency of his consumption of child pornography, the surrounding circumstances, and any relevant

⁴At the time of the hearing on the motion, the state presented only five images to be admitted, of which the trial court found at least three admissible. These images depicted girls only, no males. At the hearing, the investigating detective informed the court that he had seen about fifteen images of prepubescent females “showing their vaginal areas or . . . in masturbatory activity,” and additional images had been recovered depicting adult males having vaginal intercourse with prepubescent girls. The court deferred ruling on the admissibility of these other images until they had been shared with defense counsel and were before the court. At trial, after Corbett’s counsel confirmed he had seen them, the court reviewed and admitted a packet containing seventeen images, several of which showed young girls engaged in sex acts with adult males. Other than objecting to their foundation, Corbett made no specific objections to these images or their publication.

intervening events. Thus, considering all the factors, the trial court found “the evidentiary value of the proof of his possession of these pornographic . . . images is not substantially outweighed by the danger of unfair prejudice.”

¶19 Corbett disputes that the child pornography provided a reasonable basis to infer he had an aberrant sexual propensity because (1) the state presented no evidence of a causal relationship between possessing child pornography and engaging in child molestation; and (2) the child pornography represented such a small fraction of the pornography found on Corbett’s computer that it was not clear these images were downloaded for their content. He also asserts that the minimal probative value of these items was outweighed by their “inherently inflammatory” nature. We do not find these arguments to be persuasive.

¶20 First, as already discussed, the language of Rule 404(c) does not require the state to present evidence of a causal relationship between a defendant’s other acts and the sexual offense charged. Rule 404(c)(1)(B) requires only a “reasonable basis” for the jury to infer that a defendant’s aberrant sexual propensity would lead him to commit the crime charged. *See* Ariz. R. Evid. 404(c), Comment to 1997 Amendment (“reasonable basis” may be established “by way of expert testimony *or otherwise*”) (emphasis added); *see also State v. Speers*, 209 Ariz. 125, ¶ 16, 98 P.3d 560, 565 (App. 2004) (evidence admitted under Rule 404(c) need not be direct evidence of guilt). The possession of sexually explicit images of prepubescent girls could provide a reasonable basis for inferring a person has an aberrant sexual propensity that might cause him to molest his eight-year-old niece.

¶21 Second, despite the fact that the child pornography recovered from his computer represented a minuscule percentage of the total sexual images,⁵ Corbett admitted he enjoyed looking at sexually explicit images of prepubescent girls. Therefore, the trial court could have reasonably concluded that he accessed these images not by accident but for their content.

¶22 Third, Corbett’s claim that the images are “inherently inflammatory” does not establish that the trial court abused its discretion in weighing the evidence under Rule 404(c)(1)(C) and Rule 403. We can conceive of no evidence of aberrant sexual propensity that would not have some prejudicial effect on a defendant. Presumably, this is why Rule 404(c)(1)(C) directs the court to assess the probative value of such evidence in the context of the risk of “unfair” prejudice. Notably, Corbett did not address the danger of unfair prejudice posed by particular images, the number of images admitted into evidence, or the form in which the evidence of child pornography was presented to the jury. Instead, he objected only to the generally prejudicial effect of evidence of child pornography. We do not mean to trivialize the potential inflammatory effect of such images, *see State v. Coghill*, 216 Ariz. 578, ¶¶ 22, 33, 169 P.3d 942, 948, 950 (finding the improper admission of adult pornography sufficiently prejudicial to order a new trial when such evidence lacked any probative value). Yet evidence of child pornography—even sexually explicit images of

⁵The court heard testimony that over 90,000 images were recovered from Corbett’s computer.

children—is not categorically excluded under Rule 404(c) and, therefore, we decline to hold, as Corbett’s argument implicitly suggests we must, that such evidence is inherently too prejudicial for admission under any circumstances. At the very least, Corbett must explain why such evidence is unfairly prejudicial in the context of his case. He has failed to do so.

¶23 For the foregoing reasons, we conclude the evidence of the instant message and child pornography were properly admitted under Rule 404(c). Corbett’s convictions are therefore affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge